Clearly, the powers of the court in dealing with the question of costs is found in O 59 r 4(1) (which is similar to O 62 r 4(1) of the English Rules of the Supreme Court). It reads as follows:

> Costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the court for the payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

From the above rule, it is clear that the court may deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. Secondly, the court may, if it thinks fit, order the payment of costs to be paid forthwith notwithstanding that the proceedings have not been concluded. The cases of *Adam & Harvey Ltd* v *International Maritime Supplies Co Ltd*[3] and *Allied Collection Agencies Ltd* v *Wood & Anor*,[4] and the commentary in *The Supreme Court Practice* 1985 para 62/4/1 would appear to me to lay down the general principle that even if the court did not make an order for costs to be taxed and paid forthwith, a party to a summons who was awarded costs was entitled to have them taxed and paid forthwith, although the action had not yet been tried. This was followed by Shankar J in *East Asiatic*.[1] On the other hand, the judgment of Smith J in *Chow Yong Hong*[2] was to the effect that the proceedings being interlocutory, the general rule was that the costs should be settled at the conclusion of the suit.

Therefore, in the circumstances of the whole case, I come to the following conclusion. First, I adopt the decision of Smith J in *Chow Yong Hong*[2] who held that where the proceedings were purely interlocutory, costs should follow the general rule that it should be settled at the end of the action.

Secondly, an order for interlocutory costs should only be made payable 'forthwith' or 'in any event' when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct (*Graham* v *Sutton, Carden & Co*[5]) or the other party has taken unnecessary or improper action (*David Beans on Injunction* (3rd Ed) p 62). Again, according to the same author, the 'order for 'plaintiff's costs in any event' is unusual in injunction cases, being more appropriate to summonses where, for example, a defendant seeks an extension of time'. In the instant case, there were valid reasons for the defendant to apply to set aside the ex parte injunction and certainly such application could not be said to be frivolous or unreasonable.

Thirdly, in the present case, the plaintiff's claim is for a declaration that the tenancy of the premises is valid and subsisting. In addition, he is claiming for a permanent injunction against the defendant with respect to the said premises, where the merit of the whole case will be litigated at the main trial. In the circumstances, I feel it is proper that the costs of the interlocutory application be taxed and paid at the conclusion of the trial.

Finally, which I should add in retrospect, I never intended to order that the costs be taxed and paid forthwith at the time when I gave my decision dismissing the defendant's application with costs.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Tan Beng Hong & Co; Presgrave & Matthews.*

Reported by *PS Ranjan*

Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 4 OF 1989
HAIDAR J
3 JUNE 1989

Arbitration — Charterparty — Dispute — Whether arbitrable — Submission to arbitration — Plaintiff commencing action regarding dispute but contending that there is no arbitrable dispute — Defendant filing counterclaim — Stay of counterclaim — Arbitrable question raised — Discretion of court — Arbitration Act 1952, s 6

Civil Procedure — Stay of counterclaim — Charterparty — Arbitrable question raised — Discretion of court— Inherent power of court — Arbitration Act 1952, s 6

The plaintiff applied for an order that the defence and counterclaim filed by the defendant be stayed and also made a further application that pending the outcome of the earlier application, all proceedings in the action be stayed. Counsel for the plaintiff later conceded that a stay of the defence could not be ordered but asked that the proceedings in respect of the counterclaim be stayed and that the matters alleged therein be referred to arbitration. The disputes between the parties arose following their entering into a charterparty with each other. The plaintiff contended that the disputes (if they existed) were subject to an arbitration clause in the charterparty and that the defendant had commenced arbitration proceedings in Singapore. It was alleged that there was an admission on the part of the defendant in a document that the charterhire for certain months were due to the plaintiff. It was contended by the defendant that they were entitled to a set-off in respect of certain sums against the charterhire notwithstanding that the charterhire was to be paid 'without discount'.

Held, allowing the plaintiff's application:

(1) The court has in certain cases a discretion to give effect to the agreement for arbitration and need not do so if it thinks it better to do otherwise. However, as master of its own affairs, the court has an inherent power to stay any action which it considers should not be allowed to continue.

(2) The conditions that the plaintiff must satisfy in order to succeed were:

(a) that there must be a valid arbitration agreement covering the question in dispute;
(b) that the plaintiff must be entitled to rely on the agreement;
(c) that the plaintiff must have taken no steps after the appearance of the defendant;

(d) that the plaintiff was ready and willing to go to arbitration; and
(e) that there was no sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

(3) The defendant had explained the circumstances that led to the alleged admission in the document and having regard to the document as a whole and the explanation therein, the document could not be construed as an unequivocal admission.

(4) The bona fide belief of the plaintiff that the Singapore arbitrator had no jurisdiction as to the first part of the plaintiff's claim should not be a bar to its right to arbitration just because it referred such claim to the court to determine whether the arbitrator had jurisdiction. If the court were to rule that such claim was arbitrable, the plaintiff had expressly said that it wished the first part of its claim to also be determined in the Singapore arbitration. It followed, therefore, that any allegation that the plaintiff by commencing the action had waived its rights to arbitration was perhaps misconceived; nor can it be construed that such action had the effect of invoking the jurisdiction of the court. This was especially so as the plaintiff had all along expressly stated that it was of the view that the arbitrator had no jurisdiction over such claim, that is, that there was no dispute.

(5) There was ample evidence that the defendant had submitted to arbitration in Singapore.

Cases referred to
1 *Bulk Oil (Zug) AG* v *Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd's Rep 129 (folld)
2 *Metal Scrap Trade Corp Ltd* v *Kate Shipping Ltd* [1988] 1 WLR 767 (refd)
3 *Luen Heng & Co* v *Oakes* [1966] 1 MLJ 14 (refd)
4 *Compania Sud Americana De Vapores* v *Shipmair BV* [1977] 2 Lloyd's Rep 289 (refd)
5 *Federal Commerce & Navigation Ltd* v *Molena Alpha Inc & Ors* [1978] 1 Lloyd's Rep 581 (refd)
6 *The 'Agios Lazarus'* [1976] 2 Lloyd's Rep 47 (refd)

Legislation referred to
Arbitration Act 1952 s 6

PS Lai for the plaintiff.
Perpetua Phang (Miss) for the defendant.

Cur Adv Vult

Haidar J: This is an application by the plaintiff by way of summons-in-chambers dated 3 February 1989 (encl 14) for the defence and counterclaim of the defendant to be stayed so that the disputes alleged therein may be referred to arbitration in Singapore.

On 3 February 1989 itself, the plaintiff filed yet another summons-in-chambers (encl 12) wherein the plaintiff sought that all proceedings be stayed pending the outcome of the application by the plaintiff as per encl 14, for the defence and counterclaim to be stayed so that the disputes alleged in the defence and counterclaim be referred to arbitration in Singapore. According to the plaintiff, any attempt to file or request for extension of time to file a reply and defence to counterclaim may be construed as taking a step in the proceedings thereby prejudicing the plaintiff to have the matter arbitrated. When this application was heard by me on 9 February 1989, after submissions, both counsel finally, by consent, agreed to the following order:

> By consent, the plaintiff given extension of time to file defence to counterclaim and reply to defence within three weeks after the outcome of the substantive application to be heard on 13 March 1989 and such extension not to be construed as taking steps in the proceedings by the plaintiff. Costs of this application to abide by the outcome of the substantive application on 13 March 1989.

On 13 March 1989 I directed that the application (encl 14) be adjourned for hearing in open court as counsel may take some time for arguments. It was adjourned to 22 April 1989.

On 22 April 1989, Miss Phang, counsel for the defendant, submitted that from the authorities, it is very clear that there is no such remedy to stay a defence. The remedy of a stay being only available in respect of legal proceedings, it cannot be used so as to prevent a defendant from raising, by way of defence to an action, an issue falling within the arbitration agreement (see p 419 of *Commercial Arbitration* by Mustill). She went on in support thereof to quote a passage from *Bulk Oil (Zug) AG* v *Trans-Asiatic Oil Ltd SA*[1] at p 135:

> Before dealing with the authorities which provide some guidance in the present situation as to how the court's discretion is to be exercised, I must deal with one point which the defendants take at the outset on the plaintiffs' summons. They say that the court can only stay the counterclaim and that it has in any event no jurisdiction to impose a stay which would have this effect of preventing the defendants from relying on any matter arising out of the transportation agreement by way of defence. This was ultimately rightly conceded by the plaintiffs. There is obviously no rule or principle which prevents a person who is a party to an agreement containing an arbitration clause from relying on that agreement and on matters arising out of it by way of defence to an action. The defendants therefore point out that they cannot be prevented from involving the plaintiffs' alleged breaches and repudiation of the transportation agreement as defences to the claim for damages under the charterparty. I agree with this.

It would seem clear, in my view, that the remedy of stay of defence is clearly not available and hence should not be allowed. I asked Mr Lai, counsel for the plaintiff, to address me on this issue. Mr Lai could not at that time do so and prayed that he be given time to look into this issue. As I reserved my judgment on the application I agreed for Mr Lai to look up the law and the authorities, if any, to rebut Miss Phang's submission.

Subsequently on 11 May 1989, Mr Lai submitted by way of a letter, with a copy to counsel for the defendant, conceding that in view of the case of *Bulk Oil (Zug) AG*,[1] the court should only stay the counterclaim and should not impose a stay on the defence. He went on to say:

> 1 If the court finds there is no dispute as to the first part of the plaintiff's claim, the filing of a formal defence does not

detract from the reality that in law there can be no dispute and the first part of the plaintiff's claim is capable of being summarily dealt with.

2 If the court finds there is a dispute as to the first part of the plaintiff's claim, the plaintiff will discontinue its action in accordance with its express undertaking to do so in its affidavit in reply on 11 March 1989. The discontinuance will effectively dispose of the first part of the plaintiff's claim and the defendant's defence before the Sarawak court.

However, he submitted that the defendant's counterclaim is to be stayed in accordance with the arbitration clause. This is so even if the plaintiff is to discontinue its action as the defendant's counterclaim remains alive (see O 15 r 2(3)) and must be stayed. He went on further to say that a stay of the defendant's counterclaim is consistent with the English Court of Appeal decision in *Metal Scrap Trade Corp Ltd* v *Kate Shipping Ltd*,[2] and the fact that the defendant has already commenced arbitration in Singapore on 30 November 1988 (though it is to be noted the defendant denied this). It was further contended by Mr Lai that the plaintiff's starting of the Sarawak action for only the first part of the claim for *purpose of clarifying jurisdiction* cannot, on any view, be regarded as a waiver of the arbitration clause. (Emphasis added.)

On the other hand, Miss Phang, counsel for the defendant, in reply vide a letter dated 11 May 1989, whilst noting that the plaintiff conceded that the defence cannot be stayed, referred to her main submission on the points of set-off etc as regards disputes to the first part of the plaintiff's claim. She further contended that the question of the plaintiff discontinuing the action is irrelevant, as it now stands, as the main action has not been discontinued yet. She went on to submit that the court is not dealing with the application for leave to discontinue the action. In any event, according to her, the plaintiff is not entitled to discontinue the action per se without leave of the court (see O 21 of the Rules of the High Court 1980). Well, here it is to be noted that the plaintiff has given an undertaking to take appropriate action depending on the decision of the court on the 'clarification' it is seeking.

Whatever it is, the matter for my consideration now should only be confined to the application of the plaintiff for a stay of the defendant's counterclaim as the plaintiff has rightly conceded that it cannot ask for a stay of the defence.

The facts giving rise to this procedural wrangle are as follows. On 3 March 1988, the plaintiff entered into a charterparty for the charter of 'Progress Carrier 1' for a period of 365 days (see 'NCS 1-7'). The charterparty provides, inter alia, that the charterhire was to be paid in US dollars monthly in advance and without discount. On 3 June 1988, the vessel was taken delivery by the defendant (see para 5 of affidavit of Ng Chee Seng — encl 14). However, on 15 September 1988, the defendant returned the vessel to the plaintiff allegedly on the ground that the vessel was not up to specification after having done a trial shipment to Taiwan. (See 'NCS 11'.) The charterhire for the months of June and July 1988 was paid in advance by the defendant to the plaintiff. The charterhire payable in advance is for US$2,300 per day. The plaintiff invoiced the defendant for charterhire from 3 August 1988 to 1 September 1988 and 2 September 1988 to 1 October 1988 (see 'NCS 8-9'). The defendant failed to pay the charterhire for August to October 1988 as invoiced by the plaintiff. The plaintiff then sent a telex to the defendant demanding the said payments (see 'NCS 10'). On 7 October 1988, the defendant sent a fax to the plaintiff in which the defendant, according to the plaintiff, admitted that the charterhire from 3 August 1988 to 1 September 1988 was due to the plaintiff and the defendant promised to pay the same around 15 October 1988 (see 'NCS 11-12'). The alleged admission is disputed by the defendant which I will advert to later in my judgment. On 27 October 1988, the plaintiff sent a telex to the defendant and advised that it has still not received payment of its invoices for the period of 3 August to 1 September 1988 in spite of the commitment to pay on or about 15 October and asked the defendant to expedite payment accordingly. In the said telex the plaintiff also asked for the settlement of its invoices for the period from 2 September to 1 October 1988. The plaintiff at the same time notified that the vessel arrived in Singapore from Taiwan on 15 September 1988 (see 'NCS 13').

On 30 November 1988, the defendant's Singapore solicitors, Param & Partners ('Param'), sent a fax to the plaintiff and under paras 4 and 5 thereof stated (see 'NCS 14'):

> We refer to cl 24 of the charterparty whereby it is clear that any dispute arising in the charterparty is to be referred to arbitration in Singapore. Our clients are prepared to settle the matter through arbitration in Singapore.
>
> In the circumstances, both parties could nominate one arbitrator each and the notice of arbitration in respect of the said dispute could be given soonest. Kindly confirm.

On 5 January 1989, the plaintiff issued a writ in the Kuching High Court claiming for the August and September charterhire.

On 10 January 1989, the defendant's solicitors in Kuching, Reddi & Co ('Reddi'), reiterated the defendant's stand and confirmed that the defendant had asked that the disputes (including the plaintiff's claim of the outstanding charterhire) be referred to arbitration in Singapore, otherwise the defendant shall apply to the court for an order of stay of the plaintiff's writ (see 'NCS 16'). On 10 January 1989, the plaintiff, through their Singapore solicitors, Drew & Napier ('D & N'), sent a telex to Param accepting the defendant's reference of the dispute to arbitration in Singapore and suggested, inter alia, for the appointment of a sole arbitrator. It also had in

mind either Haridas Ajaib or Yong Lih Shyng (see 'NCS 17'). On 10 January 1989, Param sent a telex to D & N stating that they would take instructions with regard to the appointment of the sole arbitrator (see 'NCS 18'). On the same date, D & N sent a fax to Param reiterating that if the defendant was unwilling to appoint a sole arbitrator by 12 January 1989, the plaintiff might proceed to appoint its arbitrator without delay (see 'NCS 19').

On 16 January 1989, D & N sent a fax to Param pointing out that they assumed the idea of a sole arbitrator was not feasible and in accordance with the charterparty, they nominated Mr Haridas Ajaib as the plaintiff's arbitrator. They further asked the defendant for its appointed arbitrator to be furnished by 17 January 1989 (see 'NCS 22'). On the same date, Param informed D & N that they did not intend to appoint an arbitrator in Singapore, citing the plaintiff's commencement of court proceedings in Sarawak as disregarding their proposal (see 'NCS 23'). On 17 January 1989, D & N sent a fax to Param giving seven days to appoint an arbitrator failing which the plaintiff's appointed arbitrator would act as sole arbitrator (see 'NCS 24').

On 24 January 1989, Param sent a fax to D & N informing the latter that they would not have the disputes arbitrated but would contest the plaintiff's claim in the Sarawak court by filing defence and counterclaim. (See 'NCS 25-26'.) On the same date, D & N sent a fax to Param reiterating that the plaintiff's claim in the High Court of Sarawak was not a dispute whereas there, the returning of the vessel prematurely was. They further stated that they treated the fax of Param dated 30 November 1988 as an invitation to submit the disputes for arbitration in Singapore and that they had accepted such an invitation on 10 January 1989 (see 'NCS 27-29').

On 25 January 1989, the defendant filed its defence and counterclaim in the Kuching High Court. On 25 January 1989, Param reiterated that they had suggested that all disputes between the parties be referred to arbitration in Singapore. They treated the plaintiff's commencement of the action in Kuching High Court for outstanding charterhire as a rejection of their suggestion. They said that because of that, they were entitled to either contest the proceedings in Kuching or apply to the court for stay of the plaintiff's proceedings (see 'NCS 30-31').

On 26 January 1989, D & N sent a telex to the defendant stating that they had agreed to submit the disputes to arbitration and hence the defendant could not bring such dispute before the Sarawak court (see 'NCS 32'). On 30 January 1989, Reddi sent D & N a fax denying that the defendant had agreed to submit to arbitration in Singapore (see 'NCS 33').

Before proceeding to consider the merits of the application of the plaintiff in respect of the stay of the counterclaim, it would at this stage be appropriate, I think, to comment on matters that brought about this procedural wrangle. It would seem clear in my view that the defendant, as can be seen from exh 'NCS 30', asserted that it was entitled to either contest the proceedings in Kuching or apply to the court for stay of the plaintiff's proceedings. In fact the defendant entered conditional appearance without prejudice to an application to stay the proceedings. However, the defendant elected to contest the proceedings in the Kuching High Court instead. If the defendant had chosen to proceed to apply to the court for stay of the plaintiff's proceedings, perhaps it would have either succeeded or the plaintiff would have agreed to such an application in view of what the plaintiff, through its solicitor, said in exh 'NCS 32' at para 2 as follows:

> First, we reiterate that in our view you have already submitted all disputes under the above-mentioned charterparty to arbitration in Singapore and we have agreed to such submission. You cannot now, in violation of the arbitration clause with respect to disputes, bring such dispute before the Sarawak court. (Emphasis added.)

However, the plaintiff's solicitor qualified the above view, without prejudice to their client referring to Singapore arbitration the dispute in respect of the defendant's breach of the charterparty etc. The plaintiff having held the view that *all* disputes under the charterparty had been referred to arbitration in Singapore, I would have thought that it would withdraw its action in Sarawak *with liberty to file* if such claim were subsequently to be ruled by the arbitrator as being outside the purview of the arbitration clause on the ground that there is no dispute. It would seem thus clear, to my mind, that both parties were rather obdurate in regard to the forum to settle their disputes. if I may say so, the defendant was agitated by the plaintiff's commencement of the action in the Sarawak court in respect of the charterhire which the plaintiff claimed is not disputable, though the defendant by exh 'NCS 14' reiterated that clearly, by cl 24 of the charterparty, any dispute arising in the charterparty is to be referred to arbitration in Singapore for which it is prepared to submit. As a result, we have the situation now where the plaintiff filed in an application to stay the counterclaim of the defendant pending the disputes being arbitrated in Singapore. For the stand that it had taken, the defendant objected strenuously to the application of stay of the counterclaim by the plaintiff and filed in an affidavit in opposition through its director, Richard Wong Shoon Fook, on 1 March 1989 (encl 18) and asserted its right to resist the claim of the plaintiff and have the other disputes also determined by one forum, ie the court. The defendant alleged that since the plaintiff had chosen to bring the action before the court, the plaintiff has taken a step in the proceedings and therefore is not entitled to a stay. For the reasons given by the plaintiff, I am of the opinion that the filing of the writ only by the plaintiff cannot constitute having taken a step in the proceedings. The issue of 'taken a step in the pro-

ceedings' will be dealt with by me later in my judgment under condition (c).

That there is the provision of an arbitration clause in the charterparty (see 'NCS 1-7') in regard to disputes between the parties is not in dispute. The relevant clause is cl 23 which reads:

> Arbitration
>
> Any dispute arising under the charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one arbitrator to be nominated by the owners and the other by the charterers, and in case the arbitrators shall not agree then to the decision of an umpire to be appointed by them, the award of the arbitrators or the umpire to be final and binding upon parties.

The place of arbitration is to be in Singapore. This is not in dispute as this is clearly stated in box 24.

Now, the power of the court to stay proceedings where there is submission to arbitration is provided under s 6 of the Arbitration Act 1952 which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter to be referred to arbitration, any party to the legal proceedings may, *before taking any steps in the proceedings*, apply to the court to stay the proceedings, and *the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement*, and that the applicant was at the time when the proceedings were commenced and still remains *ready and willing to do all things necessary to the proper conduct of the arbitration, may* make an order staying the proceedings. (Emphasis added.)

The wordings in s 6 of the Arbitration Act 1952 seem to be substantially the same as in s 4(1) of the UK Arbitration Act 1950.

There is no doubt that the court has in certain cases a discretion to give effect to the agreement to arbitrate and need not do so if it thinks it better to do otherwise. However, as master of its own affairs, the court has an inherent power to stay any action which it considers should not be allowed to continue. In this respect I would follow the guidance from 2 *Halsbury's Laws of England* (4th Ed) at paras 560-566 wherein conditions of obtaining stay are succinctly set out. In short, the conditions that the plaintiff must satisfy in order to succeed are:

(a) there must be a valid arbitration agreement covering the question in dispute;
(b) the plaintiff must be entitled to rely on the agreement;
(c) the plaintiff must have taken no steps after appearance;
(d) the plaintiff is ready and willing to arbitrate;
(e) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

Condition (a)

That there is a valid arbitration agreement, I think, is not disputed here. However, there seemed to be a tussle between the parties as regards the first part of the plaintiff's claim, that is, in respect of the charterhire for the months of August and September 1988 as in the writ filed therein. The plaintiff explained that the first part of the claim is not caught by the arbitration clause in respect of any dispute that needs to be referred to arbitration and advanced two grounds.

First, there is an admission on the part of the defendant that the charterhire for the months of August and September is due to the plaintiff relying on the fax from the defendant (see 'NCH 11-12'). The relevant paragraph reads:

> As mentioned to Kelvin Ng, we will settle the invoice for period from 3 August to 1 September 1988 on or around 15 October 1988 and not earlier so giving us one week and threatening us with legal proceeding is not going to help at all.

The defendant's counsel, however, contended that the above alleged admission must not be considered in isolation but the whole statement must be taken together. She relied on *Sarkar on Evidence* (11th Ed), where at p 182, it is stated:

> The first important rule with regard to admission is, that the whole statement containing the admission must be taken together, for though some part of it may be favourable to the party, and the object is only to ascertain what has one conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, cannot be ascertained ...
>
> It is settled law that an admission amounting to confession or not cannot be split up and part of it used against the maker. It must be used either as a whole or not at all.

She went on further to rely on the case of *Luen Heng & Co* v *Oakes*[3] where at p 14, Abdul Aziz J (as he then was) on the issue of admission of liability, said:

> The whole case rests on the interpretation of that part of the letter offering payment by instalments to 'avoid litigation' sent by Mr Oakes as treasurer of the club. That letter, to my mind, can be interpreted to mean an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff of the club. This is a triable issue ...

In the alleged admission, the defendant stated earlier on that the vessel did not meet up to specification and then requested the plaintiff not to threaten legal action but to sort out the matter amicably, and then only comes the proposal to pay the charterhire for August and September on or around 15 October 1988 and also for the plaintiff to charter the vessel to other parties failing which to do the vessel up to specifications. It was further deposed to in para 10 of the affidavit in opposition of Richard Wong Shoon Fook, the director of the defendant company (encl

18) that the fax ('NCH 11') was written without prior legal advice. In any event, it was submitted that according to *Sarkar on Evidence* at p 179: 'Admissions, though sometimes strong evidence, are not, however, conclusive proof of the matters admitted ... persons making admissions are at liberty to contradict them or to show that they are untrue or mistaken or made under a misapprehension.' The defendant had explained the circumstances that led to the alleged admission in the fax and having regard to the fax as a whole and the explanation therein, I am constrained to hold that the fax cannot be construed as an unequivocal admission to pay.

Second, as regards the issue that the defendant is to pay to the plaintiff charterhire in advance 'without discount', the word 'without discount' has been interpreted to mean 'no more than that there was to be no discount for early payment', per Parker LJ in *Compania Sud Americana De Vapores* v *Shipmair BV*[4] at p 292. The defendant claimed that it is entitled to a set-off as the arbitration agreement does not seem to indicate that the defendant is to pay hire without being entitled to deduct other sums no matter what their nature may be, or that if a right of set-off exists apart from special provision, such right was intended to be excluded. If such right does exist, clear words would be necessary to exclude it. Miss Phang further relied on the case of *Federal Commerce & Navigation Ltd* v *Molena Alpha Inc & Ors.*[5]

In short, the defendant alleged that the first part of the plaintiff's claim as in the writ could properly come within 'any dispute' under cl 23 of the arbitration agreement and not as the plaintiff seemed to view it as being plain and obvious that it should not go for arbitration.

It would thus seem clear, in my opinion, that the first part of the plaintiff's claim would come under 'any dispute' in the arbitration agreement and therefore arbitrable and in that event (a) would have been satisfied.

It should be noted here that the defendant made the advanced charterhire for June and July when the vessel was not yet put to use and it was only used for the first time for shipment of coal from Sarawak in August/September when it was discovered that the vessel did not meet with the specifications stipulated in the charterparty. Hence the reason, to my mind, for the decline of payment of charterhire for August/September and claim for a set-off.

Condition (b)

There should not be any dispute as to this ground.

Condition (c)

The plaintiff must have taken no step in the proceedings after appearance. In this case the plaintiff filed the present application on 3 February 1989 after being served the defence and counterclaim dated 24 January 1989 by the defendant. The plaintiff did not file a reply and defence to the counterclaim nor did the plaintiff apply for time to file the same. Instead, the plaintiff applied to the court for an order that further proceedings after the defendant's filing of defence and counterclaim be stayed. In fact in the plaintiff's application (encl 12) it was agreed, by consent of both parties, that the extension to file defence to the counterclaim and reply to the defence should not be construed as taking steps in the proceedings by the plaintiff. The application of the plaintiff (encl 12) is that all proceedings be stayed pending the outcome of the application by the plaintiff for the defence and counterclaim to be stayed so that the disputes alleged in the defence and counterclaim be referred to arbitration in Singapore; otherwise, if any attempt is made to file or request for extension of time to file reply and defence to counterclaim, it may be construed as taking a step in the proceedings thereby prejudicing the plaintiff to have the matter arbitrated.

According to *Russell on Arbitration* (20th Ed), at p 421, under 'step in the proceedings', it is stated:

> The reported cases are difficult to reconcile and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his rights to a stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.

The plaintiff contended that the filing of the first part of the claim is on the ground that it felt that such claim is not arbitrable whereas the defendant asserted that it is. If the plaintiff were to submit such claim to arbitration and subsequently it is held that it is not arbitrable then the plaintiff may be left without remedy as time may run against them by the time they were to proceed with such claim in the court — and unnecessary costs may be incurred which may be irrecoverable. The plaintiff contended that it should not be deprived of the right to arbitration because it referred to this court to determine whether the arbitrator had jurisdiction. The plaintiff reiterated that the reference to this court to determine the extent of the arbitrator's jurisdiction is important as the Singapore arbitration award will ultimately come up for scrutiny before this court when it is to be enforced against the defendant's assets in Sarawak. In this respect the plaintiff relied on *Metal Scrap Trade Corp Ltd* v *Kate Shipping Ltd.*[2] In so far as the aforesaid case is relevant, the defendant there had commenced arbitration proceedings against the plaintiff for breach of contract to buy a ship. The plaintiff denied there was a contract and said consequently it was not bound by the arbitration clause in the contract. The plaintiff applied to the English court for a declaration that the arbitrators had no jurisdiction as there was no contract and that, if there was, it did not incorpo-

rate the arbitration clause. The defendant filed a counterclaim in the English court for the plaintiff's breach of contract. The plaintiff applied to strike out the defendant's counterclaim. The plaintiff argued, inter alia, that if the English court found the arbitrator had jurisdiction over the plaintiff, the plaintiff would want the counterclaim determined at arbitration. The Court of Appeal struck out the defendant's counterclaim. The majority stated that a party in the plaintiff's position should not lose its rights to arbitration because it resorted to the court to determine if the arbitrator had jurisdiction over the matter.

Thus, it is argued that the principles in the aforesaid case are applicable to the plaintiff's case here. The bona fide belief of the plaintiff that the Singapore arbitrator has no jurisdiction as to the first part of the plaintiff's claim should not be a bar to its rights to arbitration just because it referred such claim to this court to determine whether the arbitrator had jurisdiction. If the court were to rule that such claim is arbitrable, the plaintiff had expressly said that it wishes the first part of its claim also to be determined in Singapore arbitration (see paras 15-17 of the affidavit of Ng Chee Seng, encl 14). It follows therefore that any allegation that the plaintiff by commencing the claim herein has waived its rights to arbitration is perhaps misconceived nor can it be construed that such action has the effect of invoking the jurisdiction of the court. This is especially so as the plaintiff all along expressly stated that it was commencing the action on the ground that it was of the view the arbitrator had no jurisdiction over such claim, that is, there was no dispute. Therefore, condition (c) would seem to have been satisfied.

Condition (d)

I think this ground is clearly satisfied and partly covered in my judgment in respect of condition (c). Further, the plaintiff has appointed its arbitrator, Mr Haridas Ajaib. Even if the defendant did not or even refused to nominate an arbitrator, and even if the reference cannot proceed until he has nominated one, that would not be a ground for refusing a stay. (See 2 *Halbury's Laws of England* (4th Ed) at para 561.)

Condition (e)

Finally the court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement. In this respect it is relevant to note that the defendant agreed to have the dispute arbitrated, as can be seen from exh 'NCS 16'; the relevant paragraph reads:

> Our clients' instructions are that they have asked that this dispute (including your client's claim herein which has been rejected) be referred to arbitration pursuant to the arbitration clause in the charterparty. Our clients have not in any way waived their rights to arbitration.

In reply to 'NCS 16', the plaintiff accepted the invitation, though to protect its interests, as is normal, the plaintiff reiterated that in its view, there can be no dispute that the charterhire is due and hence the plaintiff's claim in Sarawak. The acceptance by the plaintiff, in so far as relevant in 'NCS 17', reads:

> We refer to your fax of 30 November. We disagree that our clients are in breach of the charterparty. In our view, it is your clients who are in breach of the charterparty. We accept your client's invitation to submit disputes under the charterparty to arbitration in Singapore.

The defendant, instead of acting on its threat 'to take the necessary steps to stay the proceedings in Sarawak' (see 'NCS 18'), elected to file defence and counterclaim to the plaintiff's action in the Sarawak court apparently, as I said earlier, the defendant was agitated by the plaintiff's court action. The plaintiff has reasonably explained that it is its bona fide belief that the charterhire is due and is not in dispute under the arbitration agreement.

Taking into consideration the above factors, I am satisfied that there is no sufficient reason shown as to why the matter should not be referred to arbitration. In the result, I am of the opinion that the plaintiff has satisfied all the conditions set out above for a stay.

The plaintiff's counsel further submitted that the defendant had in fact commenced arbitration prior to delivering the defence and counterclaim and cited the *Agios Lazarus*.[6] Lord Denning MR at p 51 said:

> In order to commence the arbitration, there must, I think, be a notice in writing served by one party on the other party. This notice must contain a requirement. I must require the other party to do one or other of two things: (1) either 'to appoint an arbitrator' or (2) 'to agree to the appointment of an arbitrator'.

Further on, the Master of the Rolls said:

> It seems to me that a notice which says: 'I require the difference between us to be submitted to arbitration' is sufficient to commence the arbitration: because it is by implication a request to agree to the appointment of an arbitrator.
>
> So in any case, a simple notice in writing requiring the difference to be submitted to arbitration is deemed to be a commencement of the arbitration.

Such statement or the like as expressed by Lord Denning MR which constitutes commencement of arbitration can be gathered from exhs 'NCS 14' and 'NCS 16', (written by the defendant's Singapore and Kuching solicitors respectively). Paragraph 4 of 'NCS 14' reads:

> We refer to cl 24 of the charterparty whereby it is clear that any dispute arising in the charterparty is to be referred to arbitration in Singapore. Our clients are prepared to settle the matter through arbitration in Singapore.

Paragraph 4 of NCS 16 reads:

> Our client's instructions are that they have asked that this dispute (including your client's claim herein which has been rejected) be referred to arbitration pursuant to the arbitration clause in the charterparty. Our clients have not in any way waived their rights to arbitration.

The plaintiff, I must say, has accepted the defendant's notice/notices for the differences to be submitted to arbitration in Singapore.

There is ample evidence from the various communications between both parties' counsel to show that the defendant had submitted to arbitration in Singapore. Finally on 16 January 1989, Param sent a fax to D & N (see 'NCS 23'), saying the defendant was prepared to arbitrate and was taking steps to stay the plaintiff's action. It is to be noted that the defendant did not want to appoint an arbitrator, the reason being the defendant did not want to incur extra expenses, and not because the defendant had not submitted to arbitration.

It would seem clear that, by the various communications as exhibited, the defendant clearly had already submitted to arbitration on 30 November 1988.

The plaintiff's counsel, relying on *Metal Scrap Trade Corp Ltd* v *Kate Shipping Ltd*,[2] asserted that where a party had commenced arbitration it should not be allowed to switch horses and litigate its claim in court. This was even though the other party in the arbitration did not submit to the arbitrator's jurisdiction. The party starting the arbitration could not even in such circumstances change its mind and have the court hear the matter. The other party however could, if the court ruled the arbitrator had jurisdiction, resort to arbitration for the matter. In other words, in my view, the defendant is precluded from arguing that the disputes should not go for arbitration in Singapore.

As I am of the opinion that the first part of the plaintiff's claim would appear to be arbitrable on the arguments of the defendant's counsel and further, there has been a commencement of the arbitration by the defendant, I am inclined to agree with the submission of the plaintiff's counsel that the defendant should not be allowed to change its mind and decide to litigate in court.

As regards the allegation of disrespect of the Sarawak court, I think, it is sufficiently clarified at para 9 of the affidavit-in-reply of Ng Chee Seng (encl 21). In any event I am of the view that such action is only administrative in nature and the defendant has not suffered any damage or was in any way prejudiced thereby.

As the conditions set out by me earlier would seem to be satisfied by the plaintiff, the court should exercise, in this case, its discretion to order a stay. In the exercise of the discretion, I would quote from *Commercial Arbitration* by Sir Michael J Mustill and Steward C Boyd at p 425, the following passage, so far as it relevant:

> From the outset, the courts have approached the exercise of this discretion on the footing that in general those who make a contract to arbitrate should be compelled to do so. 'A bargain is a bargain', and the parties ought to abide by it, unless a clear reason applies for their not doing so.

Further, as I said earlier, the defendant by its communications impliedly, if not clearly, showed that it had commenced arbitration.

It appears that a strong cause for refusing a stay must be shown by the defendant as even the expense of arbitration proceedings is insufficient ground for refusing a stay. (See 2 *Halbury's Laws of England* (4th Ed) at p 292.)

Miss Phang submitted that if a grant of stay of the counterclaim is allowed, there will be a multiplicity of action and additional costs and expenses. With respect, I am unable to agree with such a submission as to my mind the issues raised in the counterclaim are in substance the issues in the arbitration and in any event the second part of the plaintiff's claim is entwined with the defendant's counterclaim and it is convenient to be dealt with in the same forum, ie the arbitration. In the result, the defendant's counterclaim may no longer be a matter for adjudication in the court.

For the reasons set out by me, I would in the circumstances allow the application of the plaintiff for a stay of the counterclaim of the defendant.

Costs

As the question of costs is entirely discretionary and having regard to the conduct of both parties that resulted in this procedural wrangle, the proper order is each party should bear its own costs.

Application allowed.

Solicitors: *Tan & Lai*; *Reddi & Co.*

Reported by *PS Ranjan*